NO. 48189-8-II

In the Court of Appeals of the State of Washington
Division 2

LINDA YEAGER, Appellant

v.

JOHN O'KEEFE, Respondent

APPELLANT'S REPLY BRIEF (CORRECTED)

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A) ISSUES

1. Use at trial of the deposition of a health care professional is not governed exclusively by CR 32(a)(5)(B).

2. Trial court did not find Dr. Kedar was a CR 26(b)(5) expert witness.

3. Trial court's error in refusing to allow the use of Dr. Kedar's deposition was not harmless.

B) ARGUMENT

1. Use at trial of the deposition of a health care professional is not governed exclusively by CR 32(a)(5)(B).

"At the trial...any part or all of a deposition, so far as admissible under the Rules of Evidence applied as though the witness were then present and testifying, may be used against any party who was present or represented at the taking of the deposition" under certain specified circumstances. CR 32(a). One such circumstance involves "[t]he deposition of an expert witness" who is a "health care professional." CR 32(a)(5)(B). The rule allows such a deposition to be used "even though [the witness] is available to testify at trial" when the deposition was "taken with the expressly stated purpose of preserving the deponent's testimony for trial" assuming there was "compliance with discovery requests made pursuant to rules 26(b)(5)(A)(i), 33, 34, and 35 (as applicable)" and assuming "opposing party [was] afforded an adequate opportunity to

prepare, by discovery deposition of the deponent or other means, for cross examination of the deponent." *Id.*

First, the rule does not indicate it is the *exclusive* means by which a health care professional's deposition testimony can be used. *Id.* Respondent argues the initial clause of CR 32(a)(5), which reads "[t]he deposition of an expert witness may be used as follows", implies exclusivity. Brief of Resp. at 7. However, CR 32(a)(5) concerns only the use of a "discovery deposition of an opposing party's rule 26(b)(5) expert witness" or the preservation "deposition of a health care professional." CR 32(a)(5)(A), (B). The Respondent's interpretation would mean the deposition of any non-retained, non-health care professional "expert" witness would never be admissible at trial. For example, under Respondent's interpretation, a civil litigant would not be able to use the deposition of a law enforcement officer with specialized training in accident reconstruction who acquired facts or developed opinions for reasons other than litigation under any circumstances, even that officer had subsequently died or was bedridden.

Second, none of the other circumstances in which a witness's deposition testimony may be used at trial specify the deponent must be a non-health care professional. CR 32(a). And rules' drafters *did* put limitations under certain circumstances on the types of deponents to which

those circumstances apply. *See* CR 32(a)(2) (limited to deponents who are parties or agents therefor); *see also* CR 32(a)(3)(B) (limited to deponents who are not out-of-state CR 26(b)(5) experts).

Third, the Drafters' Comment to the 1993 Amendment to CR 32, which added CR 32(a)(5)(B), makes clear that addition was intended to make it *easier* to use depositions in lieu of live testimony. Karl B. Tegland, 3A Wash. Prac. at 757-58 (6th Ed. 2013). Specifically, the rule was designed to "address[]...the high cost of litigation in general, and the expense associated with presenting the testimony of a health care professional at trial specifically." *Id.* at 758. "[W]hile the cost of deposing [a health care professional] expert (perhaps after office hours) may be measured in the hundreds of dollars, the fee charged for testifying at trial (during the work day) can be several thousands of dollars." *Id.* CR 32(a)(5)(B) "allow[s] a party to depose a health care professional for the purposes of preserving such person's testimony for trial, even though the person is available to testify at trial." *Id.*

Fourth, interpreting CR 32(a)(5)(B) as non-exclusive, and allowing health care professionals' deposition testimony to be used under CR 32(a)(3)(B), does not render CR 32(a)(5)(B) superfluous. CR 32(a)(5)(B), unlike CR 32(a)(3)(B), would allow the use of deposition testimony of an in-county witness. *Compare* CR 32(a)(5)(B) *with* CR 32(a)(3)(B).

Moreover, CR 32(a)(5)(B), unlike CR 32(a)(3)(B), would allow the use of deposition testimony even if the party offering the deposition procured the absence of the witness. *Id.* Furthermore, CR 32(a)(5)(B), unlike CR 32(a)(3)(B), would allow the use of deposition testimony even if the deponent was an out-of-state opposing party's CR 26(b)(5) expert witness. *Id.*

Fifth and finally, interpreting CR 32(a)(5) to be the exclusive means for using health care professional's deposition testimony would lead to an absurd result. Such an interpretation would mean the discovery deposition testimony of a health care professional (at least where he is not the opposing party's CR 26(b)(5) expert), unlike the discovery deposition testimony of a non-health care professional, could not be used to contradict or impeach him when he testifies at trial. *See* CR 32(a)(1). Or that a health care professional's discovery deposition could not be used after he has died. *See* CR 32(a)(3)(A). Or after he has gone to prison. *See* CR 32(a)(3)(C). Or developed dementia. *Id.* Or refuses to respond to a subpoena. *See* CR 32(a)(3)(D). Or when the court finds "exceptional circumstances exist to make it desirable, in the interests of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court," the court would nevertheless be prevented from allowing the use of a health care professional's discovery deposition testimony at trial. *See* CR 32(a)(3)(E).

Therefore, although Dr. Kedar is a "health care professional," as the term is used in CR 32(a)(5)(B), his status does not render the other parts of CR 32(a) inapplicable. And, because trial counsel sought to introduce portions of the transcript of Dr. Kedar's deposition at trial pursuant to CR 32(a)(3)(B), and because his deposition met that test, the trial court erred in not allowing the use of those deposition transcript excerpts.

2. Trial court did not find Dr. Kedar was a CR 26(b)(5) expert witness.

"The discovery deposition of an opposing party's rule 26(b)(5) expert witness, who resides outside the state of Washington, may be used if reasonable notice before the trial date is provided to all parties and any party against whom the deposition is intended to be used is given a reasonable opportunity to depose the expert again." CR 32(a)(5)(A). A "rule 26(b)(5) expert" is one who has "acquired" "facts" "or developed" "opinions" "in anticipation of litigation or for trial." CR 26(b)(5). A CR 26(b)(5) expert is a narrow class of "expert" in the evidentiary sense. *Compare* CR 26(b)(5) *with* ER 702. The broader evidentiary definition of "expert" is "a witness" who has "scientific, technical, or other specialized knowledge" based upon his "knowledge, skill, expertise, training, or

education" and may therefore be allowed to testify "in the form of an opinion." ER 702.

Here, the trial court found Dr. Kedar "was designated...as an expert witness." RP 388. However, the trial court declined to find Dr. Kedar was "hired in anticipation of litigation." RP 355. The trial court elaborated on what it meant by "expert witness":

> [The trial court] was persuaded by having read the deposition transcript excerpts that Plaintiff offers that they are opinions on causation related to the car accident. And as such, [the court was] unable to conclude that this witness is anything other than an expert witness being offered to present testimony on a critical medical issue in this case.

RP 388. The trial court made no findings that Dr. Kedar was retained, had acquired facts, or had developed opinions in anticipation of litigation or for trial. And the way in which the trial court discusses its finding that Dr. Kedar was an "expert witness" makes clear it was applying the ER 702 definition of "expert," not the CR 26(b)(5) definition of "expert." Therefore, the trial court *did not* conclude Dr. Kedar was a CR 26(b)(5) expert.

Nor should the trial court have done so. Ms. Yeager filed a Disclosure of Primary Witnesses that did not identify Dr. Kedar, and then a Supplemental Disclosure of Primary Witnesses, that did identify Dr. Kedar. CP 7-20. The former had a section heading of "Medical

Professionals and Experts," with subsections for "Medical Experts" and "Treating Physicians and Providers." CP 9-10. The latter only had a section named "MEDICAL PROFESSIONALS." CP 19. The treatment of Dr. Samuel Coor in the initial disclosure demonstrated he was a retained CR 26(b)(5) expert, both because he is explicitly referred to as a "medical expert" and because his "report and CV [were] attached," in contrast with all other health care professionals identified in either disclosure. CP 9-11, 19-20. Although designating Dr. Kedar as a "medical professional" in the supplemental disclosure may not have been the most clear phrasing, in the context of the other disclosure and different treatment of Dr. Coor, Dr. Kedar was clearly being designated as an ER 702 expert, not a CR 26(b)(5) expert.

3. Trial court's error in refusing to allow the use of Dr. Kedar's deposition was not harmless.

"[E]rror is...prejudicial [if], within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred." *State v. Bourgeois*, 133 Wn.2d 389, 403 (1997).

Here, Dr. Kedar's deposition testimony contained, according to Respondent's trial counsel, "opinion testimony as to medical causation of injuries from the car accident." RP 383. Moreover, the Respondent's trial counsel indicated "the testimony the Plaintiff has indicated in the proposed

designations" of the deposition transcript of Dr. Kedar related the "visit on November 7, 2013 [was] reasonably and necessarily related to the January 28, 2011 car accident." RP 384. Furthermore, the trial court, having reviewed "the deposition transcript excerpts [from Dr. Kedar's deposition] that Plaintiff [designated contain] opinions on causation related to the car accident." RP 388. Furthermore, the trial court opined Dr. Kedar's deposition testimony concerned "a critical medical issue in this case," namely that Appellant "has fibromyalgia" that was caused by the car accident. RP 383, 388. However, the record is sufficiently developed to allow this Court to conclude, within reasonable probabilities, that outcome of the trial would have been materially affected had Dr. Kedar's deposition transcript been considered by the jury.

Significantly, Dr. Kedar's opinion that Ms. Yeager's fibromyalgia was caused by the car accident does not appear elsewhere in the record. Specifically, the only medical records concerning Virginia Mason Medical Center, where Dr. Kedar worked, were contained in Exhibit 6, which was introduced by the Respondent at trial. CP 20, 108. Within Exhibit 6, Dr. Kedar's only role concerned performing an "[i]maging test" concerning an "eval[uation] for arthritis [in] both hands." Ex. 6 at 8-9. Dr. Kedar's report contained in Exhibit 6 does not mention a motor vehicle accident or fibromyalgia. *Id.*

Moreover, within Exhibit 6, the only mentions of fibromyalgia appeared in three medical records, none of which involved Dr. Kedar, and more importantly, none of which contained an opinion that Ms. Yeager's fibromyalgia was caused by a motor vehicle accident. The first record contained within Exhibit 6—a medical report from a "consultation" with "Johnson, Marta R as proxy for Stone MD, Vivian V" on May 30, 2013—only clarified Ms. Yeager had "developed diffuse pain syndrome following MVA a couple of years ago – consistent with fibromyalgia." Ex. 6 at 2-4. The second—an "Outpt Clinic Note" from Alice Kim, MD on December 13, 2013—mentions fibromyalgia as a "chief complaint" of Ms. Yeager, and discusses side effects associated with opiate use. Ex. 6 at 13-14. The third—an "Outpt Clinic Note" from Dr. Stone on June 19, 2013—indicates Ms. Yeager "clearly has concominant [sic] chronic pain syndrome – consistent with fibromyalgia" and discusses "pain...management." Ex. 6 at 17-20. None of these medical records provide any evidence about the fibromyalgia having been *caused* by a car accident. At most, these records establish Ms. Yeager had fibromyalgia, and that its onset occurred after the car accident. Dr. Kedar's opinion on causation, then, would have materially affected the outcome of the trial.

Finally, Dr. Coor's testimony did not address fibromyalgia at all. *See* RP 182-210. Dr. Coor did not believe the medical records he reviewed

represented a complete set of Ms. Yeager's medical records. RP 193-94. Although Dr. Coor did review records from "three rheumatologists," one of whom may have been Dr. Kedar, who collectively concluded there was "no evidence" Ms. Yeager had "an autoimmune disorder," fibromyalgia is not an autoimmune disorder. RP 190; Ex. 6 at 4. Therefore Ms. Yeager was unable to elicit the evidence of causation from Dr. Coor. Thus, the trial court's ruling denying the admission of Dr. Kedar's deposition transcript was not harmless error.

C) CONCLUSION

The trial court erred in ruling CR 32(a)(5) represented the exclusive means by which a deposition of an ER 702 expert may be used at trial. Furthermore, although the trial court correctly found Dr. Kedar to be an ER 702 expert, the trial court did not find Dr. Kedar was a CR 26(b)(5) expert. Thus, the trial court erred in not allowing the use of Dr. Kedar's deposition transcript at trial under CR 32(a)(3)(B).

DATED this 2nd day of September, 2016.

/s/ Christopher Taylor _____
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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing APPELLANT'S REPLY BRIEF (CORRECTED) was delivered this 2nd day of September, 2016 to ABC Legal Messengers, with appropriate instructions to forward the same to counsel for the Respondent as follows:

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Comments:

Corrected reply given Court's notation ruling dated September 1, 2016

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